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In The

Supreme Court of the United States

October Term, 1997

ROBERT CABRAL,

Petitioner,

v.

HEALY TIBBITTS BUILDERS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

To qualify for coverage under the Jones Act, 46 U.S.C. App. § 688(a), "a seaman must have a connection to a vessel . . . that is substantial in terms of both its duration and its nature." *Chandris, Inc. v. Latsis*, 515 U.S. 347, 368 (1995). Must an injured employee work on the high seas (as opposed to the navigable waters of an ocean harbor) to satisfy this requirement?

PARTIES TO THE PROCEEDING AND DISCLOSURE UNDER SUP.CT.R. 29.6

The petition accurately lists the parties to the proceeding.

Respondent Healy Tibbitts Builders, Inc., a corporate defendant, is an affiliated company of Weeks Marine, Inc. Both corporations are privately held. There is no public parent corporation or nonwholly owned subsidiary of Respondent Healy Tibbitts Builders, Inc.

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STATEMENT OF THE CASE

This case concerns the legal status of an injured maritime employee who claims mutually exclusive remedies against his employer. Under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901 *et seq.*, an injured maritime worker, other than "a master or member of a crew of any vessel," is entitled to wage compensation and medical benefits regardless of fault. 33 U.S.C. § 902(3); 33 U.S.C. § 905(a); 1 SCHOENBAUM, ADMIRALTY AND MARITIME LAW (2d ed. 1994), § 7-1, pp. 371-2. The Jones Act, 46 U.S.C. App. § 688(a), passed in 1920, provides a cause of action in negligence to any "seaman" injured in the course of employment. These two statutory remedies, the LHWCA and the Jones Act, are admittedly mutually exclusive. *See, e.g., Chandris, Inc. v. Latsis*, 515 U.S. 347, 355-56 (1995); *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 88 (1991); *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 347 (1991); *Swanson v. Marra Brothers, Inc.*, 328 U.S. 1, 7 (1946).

Petitioner was initially hired by respondent out of the union hall to operate a crane on-land on Kauai on July 14, 1993. *See* R.11, 72-73.[1]

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[1] Citations to Plaintiff-Appellant Robert A. Cabral's Excerpts of Record in the Ninth Circuit are cited with "R." and the page number. Citations to Defendant-Appellee Healy Tibbitts Builders, Inc.'s Excerpts of Record in the Ninth Circuit are cited with "SR." and the page number.

From July 14, 1993 through May 31, 1994, petitioner worked various jobs for respondent, all as a crane operator, some on barges, some on land, including the operation of cranes in respondent's yard.[2] *See* R.11.

Beginning June 1994 through August 14, 1994, respondent had no work for petitioner. On August 8, 1994, respondent commenced a job which required the removal and reinstallation of mooring dolphins for the Ford Island Ferry in Pearl Harbor. *See* R.74, 76, 12. The crane operator initially assigned by respondent to operate the crane on Barge 538 on the Ford Island job was reassigned to another job and petitioner was hired back on August 15, 1994 to operate the crane. *See* R.74. Petitioner was not assigned to Barge 538. He was hired and assigned to the job as a crane operator. *See* R.75, SR.36-37.

Barge 538 was located in Pearl Harbor within catwalk distance from land and between mooring dolphins on the port and starboard side of the barge. *See* R.3-6. Barge 538 was secured to the land by stern lines. *See* R.83. Bow lines ran to anchors. *See* R.82.

Since the barge was not equipped with bathroom, dining or sleeping facilities, petitioner boarded and

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[2] In his Opening Brief to the Ninth Circuit, petitioner calculated his time spent operating cranes on vessels for respondent at between 30% and 36%. *See* Petitioner's Opening Brief, p.16 n.1. Respondent notes that in his Petition for Writ of Certiorari, petitioner suggests that the period of employment considered by the district court was incorrect. *See* Petition for Writ of Certiorari, p.7 n.7. However, this issue is not on appeal and the record herein evidence a more enduring period of employment with respondent from 7/14/93 through 10/27/94.

disembarked the vessel via a catwalk to the shore on every occasion that he worked as a crane operator. Petitioner was not responsible for operating or maintaining the barge. *See* SR.36-37. This Court will find, as did the district court and the Ninth Circuit Court of Appeals, that there is absolutely no evidence in the record petitioner was hired or functioned as a crewmember or deckhand for respondent. The record contains no evidence petitioner handled lines, maintained the barge, prepared the barge for movement or ever sailed the seas, including those of Pearl Harbor, while employed by respondent.

In fact, during petitioner's operation of the crane on Barge 538 on the Ford Island job, it never moved from its moored location immediately adjacent to the shore. *See* R.90. However, on September 24, 1994, while the Ford Island job was still in progress, Barge 538 was relocated across Pearl Harbor to Wharf Y2 on a completely different drilling job. *See* R.64. The drilling job involved the taking of soil samples off Wharf Y2. Respondent's personnel assisted in loading the drill onto Barge 538 and in moving the barge across Pearl Harbor. *See* R.64-65, 9-10.[3]

However, since Petitioner was not assigned to the barge as a crewmember or deckhand, he was not involved with the movement of the barge across the

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[3] The Daily Time Sheets for 9/24/94 and 9/25/94 at R.9-10 contain the name "Cabral R.E." and are signed by "R. Cabral" beneath the remarks section containing notes regarding the movement of Barge 538 and the drilling operation. "R. Cabral" and "Cabral R.E." contained on the daily time sheets at R.9-10 are the initials of a relative of Plaintiff-Appellant, Ricky Cabral, *not* the petitioner herein.

harbor. *See* R.65-66, 75, SR.36-37. On the morning of September 26, 1994, after Barge 538 had been repositioned for the Ford Island job, petitioner was allegedly injured while stepping from the catwalk to the barge. *See* R.3-6. On November 4, 1994, petitioner filed a written claim for benefits against respondent under the LHWCA. *See* SR.32. On February 2, 1995, petitioner filed suit under the Jones Act. Petitioner did not request a jury trial. *See* R.103.

On May 4, 1995, petitioner filed a motion for summary judgment claiming seaman status as a matter of law. *See* R.103. On May 23, 1995, respondent filed a cross-motion for summary judgment seeking the denial of seaman status as a matter of law. *See* R.104.

In reaching its decision, the district court focused on the specific facts surrounding petitioner's employment, facts which were not in dispute inasmuch as both parties filed motions for summary judgment on the same issue and facts, albeit opposite sides of the same issue. Based on Barge 538's physical characteristics and prior maritime use, the district court assumed without deciding that Barge 538 was a vessel in navigation. *See* App. C, Petition for Writ of Certiorari, at 27a-28a. Moving on to the nature of petitioner's connection to the vessel, the district court once again focused on the unique facts of the case, as well as the precedent set forth by the Supreme Court in *Latsis*, to decide as a matter of law that petitioner did not owe "allegiance" to Barge 538, that his connection to the barge was "transitory" relative to his complete employment history with respondent, and that petitioner was not regularly exposed to the 'perils of the sea.' " *Id.* at 28a-30a.

On appeal by petitioner, the Ninth Circuit affirmed[4] without reaching the "vessel" issue. *See* App. A, Petition for Writ of Certiorari, at 11a. In reviewing *de novo* the undisputed evidence presented to the district court, the Ninth Circuit concluded that petitioner had presented "no evidence from which a reasonable jury could infer that Cabral met the substantial connection test." *Id.* at 10a-11a. In reaching their decision, the Ninth Circuit specifically noted that "[a]ll of the evidence points to one conclusion: that Cabral was a land-based crane operator who happened to be assigned to a project which required him to work aboard Barge 538." *Id.*

Although the Ninth Circuit quoted the Supreme Court's language and findings in both *Latsis* and *Harbor Tug & Barge Co. v. Papai*, 117 S.Ct. 1535 (1997), *see* App. A, Petition for Writ of Certiorari, at 6a-10a, nowhere in its decision did the Ninth Circuit state or imply that petitioner was denied seaman status because he failed to work on the "high seas" or "open seas."

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[4] As pointed out by petitioner in his Petition for Writ of Certiorari, the Ninth Circuit issued an order affirming the district court on July 8, 1997 and subsequently amended its order affirming the district court on October 15, 1997, both of which contain the same operative findings. *See* App. A and B, Petition for Writ of Certiorari. Respondent's Opposition Brief will cite to the Ninth Circuit's amended order, Appendix A to the Petition for Writ of Certiorari.

REASONS FOR DENYING THE PETITION

THE QUESTION PRESENTED IS HYPOTHETICAL AND WAS NOT DETERMINATIVE TO THE NINTH CIRCUIT'S DECISION

Petitioner's primary argument for certiorari is based upon an overly expansive and broad reading of the Ninth Circuit's decision. Petitioner builds all of his arguments for certiorari from an initial premise that the Ninth Circuit held petitioner was not a seaman based upon his failure to work on the "high seas" or "open seas." Petitioner's foundational premise, however, is flawed and, on that basis alone, the Petition for Writ of Certiorari should be denied.

Petitioner cannot cite to a page in the Ninth Circuit decision where the "high seas" or "open seas" were discussed, much less distinguished from petitioner's work on Barge 538 within the confined waters of Pearl Harbor. The phrases "high seas" and "open seas" do not exist in the Ninth Circuit's decision, nor were they operative to the court's decision process below. In fact, the Petition for Writ of Certiorari cites more frequently to the Supreme Court's language in *Latsis* and *Papai* as the foundation for its premise than the Ninth Circuit's written decision in this case. Taking the Supreme Court's language in *Latsis* and *Papai*, petitioner argues that he believes "[t]he court below evidently believed that 'substantial in . . . nature' means work on the high seas." *See* Petition for Writ of Certiorari, at 7.

As pointed out by petitioner, not only is there "no precedent for that notion," *id.*, there is no evidence that the Ninth Circuit's decision turned on such a narrow and

confined reading of the "substantial in . . . nature" requirement announced in *Latsis*, 515 U.S. at 368. To the contrary, the Ninth Circuit's written decision documents the consideration of facts and issues far beyond the petitioner's restrictive premise, facts which support the Ninth Circuit's affirmation of the district court's decision.

Consider, for example, nowhere in the briefing papers to the Ninth Circuit, nor during oral arguments before the court, did the issue of work on the "high seas" or "open seas" versus the confined waters of Pearl Harbor come into play. Respondent never argued that under *Latsis* petitioner could not qualify as a seaman because he failed to work on the "high seas" or "open seas." Respondent did argue that petitioner was not regularly exposed to "perils of the sea" given the specific facts of this case. However, that is a far cry from arguing all seaman who work on barges in confined harbors are not seaman as a matter of law. The Ninth Circuit's fact specific inquiry into the unique facts of this case evidenced many undisputed facts indicating petitioner was a land-based worker, including but not limited to the fact that petitioner never plied the waters at all, much less the "high seas" or "open seas."

Thus, petitioner's attempt to jump from a conclusion of law based upon a fact specific inquiry into the totality of unique facts comprising this case to a conclusion of law based upon one fact, petitioner's failure to work on the "high seas" or "open seas," is misleading and does an injustice to the Ninth Circuit's complete analysis of this case. To grant certiorari under such circumstances would amount to this Court considering a hypothetical issue,

which was not determinative to the Ninth Circuit's analysis of this case. In addition, granting certiorari based upon the question presented by petitioner would do nothing to clarify or settle the law, as it is undisputed that the U.S. Supreme Court and Congress have never limited application of the Jones Act to individuals who work on the "high seas" or "open seas." The Ninth Circuit's decision in no way states otherwise.

In fact, the written decision of the Ninth Circuit confirms respondent's argument herein. If the determinative issue before the Ninth Circuit was work on the "high seas," as argued by petitioner, then why would the Ninth Circuit expressly focus on the fact petitioner did not work upon Barge 538 when it moved within the confined waters of Pearl Harbor on September 24, 1994 and September 25, 1994? *See* Petition for Writ of Certiorari, App. A at 10a. The answer is, the Ninth Circuit would not have focused on that fact, for under petitioner's analysis it would have been a moot point for the court to consider facts within Pearl Harbor when the court was arguably applying a test for seaman status which began at the "high seas."

In summary, petitioner's presented question incorrectly assumes the Ninth Circuit decided this case based upon a conclusion of law and interpretation of *Latsis* that a worker must work on the "high seas" to qualify as a seaman, a premise which is incorrect and unsupported by the Ninth Circuit's written decision.

THE NINTH CIRCUIT'S DECISION IS BASED UPON A FACT SPECIFIC INQUIRY IN A CASE WITH UNIQUE AND DISTINCT UNDISPUTED FACTS

As noted in *Latsis, supra* at 361, "the Jones Act inquiry is fundamentally status based: Land-based maritime workers do not become seamen because they happen to be working on board a vessel when they are injured, and seamen do not lose Jones Act protection when the course of their service to the vessel takes them ashore."

In an effort to flesh out petitioner's status as either a seaman or a land-based maritime worker, the district court and the Ninth Circuit both focused on the unique and distinct undisputed facts in this case. "The distinction between the two mutually exclusive categories can be difficult to implement, and many cases turn on their 'specific facts'," *Papai, supra* at 1538. "The inquiry into seaman status is of necessity fact specific," *Wilander, supra* at 356. However, "summary judgment or a directed verdict is mandated where the facts and the law will reasonably support only one conclusion." *Wilander, id.; see also Latsis*, 515 U.S., at 368-369, and *Papai*, 117 S.Ct., at 1540.

There is no question that the specific facts in this case are undisputed. This Court should note that at no time did petitioner ever suggest to the Ninth Circuit that a determination of his status was inappropriate for summary judgment. As such, it is a little late for petitioner to suggest, for the first time to the U.S. Supreme Court on certiorari, that "[a]t the very least, petitioner's status is a fact question that should have been decided at trial rather than on summary judgment." *See* Petition for Writ of

Certiorari, p. 10. This Court is reminded that petitioner was first to move for summary judgment on the issue of seaman status. Additionally, petitioner never exercised his right to a jury trial. As such, the fact question urged by petitioner would ultimately be decided by the same judge who entertained the initial motions for summary judgment, although under less stringent non-summary judgment standards.

After reviewing the specific facts of this case, both courts below agreed the undisputed historical facts unique to this case make summary judgment appropriate because the law will not reasonably support another conclusion. *See, e.g., Wilander, supra* at 356.

In his brief, petitioner avoids the specific facts of this case, facts which make summary judgment appropriate. Instead, petitioner focuses on a question which was never in issue below. As discussed previously, the courts below never wrestled with the issue of whether petitioner's operation of the crane on Barge 538 constituted work on the "high seas" or "open seas." Instead, both courts focused on the following specific facts:[5]

1. Petitioner was first hired by respondent on July 14, 1993 out of the union hall;

2. Petitioner was hired as a crane operator, not as a crewmember or deckhand;

3. Petitioner was assigned to various jobs by respondent;

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[5] Unless otherwise indicated herein with a specific cite, all listed arguments of fact are supported by respondent's Statement of the Case with cites to the record.

4. Petitioner was never assigned by respondent to a vessel or Barge 538;

5. Petitioner's employment chronology with respondent in the calendar years 1993 and 1994 included assignments to jobs "onshore", "on beach", "in yard", at "Kahe Power Plant, Oahu," at "Kal Hwy, Hawaii Kai, Oahu," at "Hickam Dormitory," and at "Hickam AFB", all of which were jobs on land and not related to any vessel on navigable waters. *See* R.11;

6. Petitioner's essential job duties never changed while working for respondent, as he always worked as a crane operator;

7. On August 15, 1994, petitioner was assigned by respondent to the Ford Island Ferry job to replace another crane operator pulled off the job by respondent;

8. The crane on the Ford Island Ferry job was located on Barge 538;

9. Petitioner was not hired to maintain Barge 538 and he did not maintain Barge 538;

10. Petitioner did not perform typical deckhand or crewmember functions on Barge 538, such as handling lines;

11. Barge 538 was moored adjacent to the shore and between mooring dolphins on its port and starboard sides;

12. Barge 538 never moved from its moored location while petitioner was onboard operating the crane;

13. Barge 538 did not contain bathroom, dining or sleeping facilities;

14. Petitioner accessed the crane on Barge 538 every day via a catwalk from the shore;

15. On September 24, 1994 and September 25, 1994, when Barge 538 was needed on a different job in a different location in Pearl Harbor, petitioner did not work on the vessel as the crane was not needed on that job;

16. On September 24, 1994 and September 25, 1994, since he was not a crewmember or deckhand on the vessel, petitioner did not assist in the movement of Barge 538 across the navigable waters of Pearl Harbor;

17. Other employees of respondent assisted in moving Barge 438 across the navigable waters of Pearl Harbor;

18. On September 26, 1994, after Barge 538 was repositioned in its moored location on the Ford Island Ferry job, petitioner was allegedly injured while stepping from the catwalk to Barge 538;

19. Petitioner filed a claim for benefits under the LHWCA on November 4, 1994;

20. Petitioner filed suit against respondent under the Jones Act on May 5, 1995.

As evidenced by the specific facts of this case, the courts below were armed with sufficient undisputed evidence to support their decisions that no reasonable jury or trier of fact could find petitioner a seaman should this matter proceed to trial. The historical facts of this case confirm that petitioner did not owe allegiance to the vessel, nor did he live his life upon the sea. Rather, he owed his allegiance as a crane operator to his land-based employer and the jobs to which he was assigned, the vast

majority of which were on land. The fact that petitioner did not work on the "high seas" or "open seas" played no part in the decisions of the courts below. The fact that petitioner was not regularly exposed to the perils of the sea was an important fact properly considered by the courts.

It is simply incorrect for petitioner to assume the Ninth Circuit's decision was intended to rule as a matter of law that all workers on vessels in confined harbors are non-seamen. This case does not stand for the global premise suggested by petitioner.

THERE IS NO CONFLICT WITH THE SUPREME COURT, OTHER CIRCUIT COURTS OF APPEAL OR STATE COURTS REGARDING THE QUESTION PRESENTED FOR REVIEW

As noted by the petitioner, this Court held in 1946 that the effect of Congress enacting the LHWCA of March 4, 1927 was "to confine the benefits of the Jones Act to the members of the crew of a vessel plying in navigable waters." *Swanson v. Marra Brothers, Inc.*, 328 U.S. 1, 7 (1946). From that resuscitation of law, petitioner argues that this "is the only requirement relating to location" and that the Ninth Circuit was wrong when it imposed "a far more restrictive location test." *See* Petition for Writ of Certiorari, p. 8. However, petitioner fails to point out where, in its decision, the Ninth Circuit allegedly restricted the holding in *Swanson*.

In support of his argument, petitioner cites numerous cases in which deckhands and crewmembers of vessels plying the waters of lakes and harbors were found to be

seamen, as if this supports his argument the Ninth Circuit must have denied petitioner seaman status because he failed to work on the "high seas" or "open seas." A close examination of the specific facts of the cited cases, however, reveals numerous ways in which they are clearly distinguishable from the instant case. Simply put, there are sufficient distinguishable facts in each cited case to account for the Ninth Circuit's decision in the instant case, irrespective of any hypothetical issue regarding work on the "high seas" or "open seas."

For example, petitioner was not hired as a deckhand or crewmember on Barge 538. The record is undisputed that he was hired by respondent as a crane operator and that he never functioned as a crewmember or deckhand. In fact, petitioner was not called in to work on the two days in September of 1994 when Barge 538 actually moved across the navigable waters of Pearl Harbor. Why? Because he was not a crewmember on the vessel and he had no allegiance to the vessel. Petitioner was a crane operator and the crane was not required on the other job across Pearl Harbor. Yet, petitioner cites *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36 (1943), as support for his argument, when the issue before the Court in *O'Donnell* was clearly not seaman status. O'Donnell was admittedly a "deckhand . . . engaged in transporting sand . . . over the navigable waters of Lake Michigan." *Id.* at 38. In *Braen v. Pfeifer Transportation Co.*, 361 U.S. 129 (1959), the petitioner was employed as a mate on respondent's barge. In *Southwest Marine, Inc. v.*

Gizoni, 502 U.S. 81, 84 (1991),[6] a case before the U.S. Supreme Court on certiorari to the Ninth Circuit, the petitioner was employed as "a rigging foreman" and he "worked on the floating platforms and rode them as they were towed into place." Further, petitioner "occasionally served as a lookout and gave maneuvering signals to the tugboat operator." *Id.* He also handled lines. *Id.* In *Norton v. Warner Co.*, 321 U.S. 565, 566-567 (1944), Rusin was employed as a "boatman on a barge." He "was continuously aboard" the barge, where he "lived, ate, and slept." *Id.* at 567. His duties, among others, included "taking general care of the barge," "taking care of lines at docks, tightening or slackening them as necessary," "taking lines from tugs" and "taking orders from the tugboat when being towed." *Id.* In *Warner v. Goltra*, 293 U.S. 155 (1934), petitioner was a master of a tugboat on the Ohio River. In *Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370 (1957),

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[6] In *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 83 (1991), this Court affirmed the Ninth Circuit's holding that the petitioner could be a seaman even though his work on vessels occurred in San Diego harbor. In its written decision in the instant case, the Ninth Circuit cited *Gizoni* in a footnote, noting that an employee is not a longshoreman as a matter of law "if genuine issues of material fact exist as to whether the worker was also a seaman under the Jones Act due to an employment-related connection to a vessel in navigation." *See* App. A, Petition for Writ of Certiorari, at 2a. Is the petitioner really suggesting that the Ninth Circuit ruled in the instant case contrary to its decision in *Gizoni*, a decision which was affirmed by the U.S. Supreme Court, without specifically discussing its departure from precedent? Surely not. The Ninth Circuit failed to discuss the fact that both Gizoni and petitioner in the instant case worked on vessels in harbors principally because it was not a determinative issue before the court.

petitioner was employed as a handyman to assist with dredging operations. There was testimony that petitioner was known as a "deckhand" and that "he was hired to clean and take care of the deck, splice rope, stow supplies, and, in general, keep the dredge 'in shape.' " *Id.* at 372.

In each cited case, a fact-specific inquiry into the employee's connection to the vessel confirms that they are clearly distinguishable from the instant case. The same holds true for petitioner's citations to other circuit courts and state supreme courts.

It does injustice to the Ninth Circuit's decision to compare it to the cited cases on an issue not raised before the court ("high seas" or "open seas" versus confined harbor), while ignoring the specific facts of each case which support their respective legal holdings. The facts of this case are particularly unique and distinct and they were recognized as such by the district court and Ninth Circuit in ruling that petitioner was not a seaman as a matter of law.

POLICY CONSIDERATIONS SUPPORT THE NINTH CIRCUIT'S DECISION

As noted by the Court in *Latsis*, the U.S. Supreme Court authored numerous decisions on seaman status in the first half of the 1900's. 515 U.S. at 355-356. Beginning in the 1950's, the Court left further definition of seaman status to the lower courts. *Id.* at 356. Instead of clarifying the law, the lower courts "created a labyrinth and got lost in it." *Johnson v. John F. Beasley Constr. Co.*, 742 F.2d 1054, 1060 (CA7 1984), *cert. denied*, 469 U.S. 1211 (1985).

During the period that the lower courts searched for workable criteria to define and apply seaman status, one scholarly voice, Professor David W. Robertson, repeatedly called upon the courts to provide "adequate guidance for distinguishing seamen from other maritime workers." Robertson, *A New Approach To Determining Seamen Status*, 64 TEX. L. REV. 79, 91 (1985), (hereinafter Robertson I), and Robertson, *The Law of Seaman Status Clarified*, 23 JOURNAL OF MARITIME LAW AND COMMERCE 1 (1992), (hereinafter Robertson II).

Specifically, Professor Robertson emphasized that:

> The courts would do better to drop the prolix "criteria" and "factors" approach and address directly the controlling policy issue: To what extent do the workers claiming seaman status in connection with the device or structure in question confront the characteristic seamen's dangers – perils of the sea or vessel-movement dangers."

Robertson II, pp. 14-15 (citations omitted).

With regard to decisions from the U.S. Supreme Court, while noting that a policy perception "was continually at work," Professor Robertson criticized the Court's status decisions for their "lack of searching discussions of the policies supporting special protections for seamen." Robertson I, p. 92.

In defining the policy considerations which he felt should be more directly addressed, Professor Robertson wrote:

> [T]he two policies at work in seaman status cases are, first, assuring the protection of the

> benevolent seamen's remedies to those workers who confront the characteristic seamen's hazards and, second, confining other maritime and amphibious workers to alternative remedial systems. The Supreme Court's law of seaman status makes the first goal paramount, but both are important.

Robertson I, at p. 93.

He also emphasized that "unless the underlying policy is kept firmly in mind and the developing doctrine continually checked against it, doctrine tends to proliferate and take on a life of its own." *Id.* at 83-84. Perhaps somewhat prophetic before the decision in *Latsis*, Professor Robertson acknowledged that "[s]ome workers who unmistakably confront the perils of the sea, often in extreme form, are thereby left out of the seaman's protections." *Id.* at 93. *See also, Latsis, supra* at 361-362.

In defining the distinguishing characteristics of seamen's work, Professor Robertson included "[e]xposure to the 'perils of the sea' and to risks attending the movement of vessels on navigable waters." *Id.* at 80. Specifically, he wrote:

> We know what is meant by perils of the sea, even though we cannot expect to enumerate all of the possible instances or sub-categories. But any list would certainly include the full range of dangers associated with deep water, wind and weather, tides and currents, ocean predators, great distances from shore, relative isolation, and inaccessibility of shore-side facilities for aid and succor.

Id. (citations omitted).

> When the duties of ship repairmen, longshoremen, and similarly situated inshore workers take them aboard a vessel, the ship is typically out of the water or at rest in calm inland water, securely moored or anchored. Such amphibious inshore workers, who do not confront the perils of the sea and who are seldom involved with vessel movement, face significant work-place hazards, but they are not subjected to the same physical and psychological risks that characterize a seaman's environment.

Robertson I, at 82 (citations omitted).

Respondent submits that even before *Latsis*, the state of general maritime law would have supported denying the petitioner herein seamen's status as a matter of law. As noted by Professor Robertson in 1985:

> The decisions sustaining summary judgment or directed verdict that inshore-barge workers were not seamen have stressed plaintiff's lack of significant involvement with vessel movement. It seems that the inshore-barge worker enjoys no implicit presumption of exposure to seamen's hazards and must convince the court that such exposure was a significant feature of his work.

Id. at 105 (citations omitted).

In discussing *Simko v. C&C Marine Maintenance Co.*, 594 F.2d 960 (CA3 1979), *cert. denied*, 444 U.S. 833 (1979), Professor Robertson proposed language which he felt would have made the court's implicit policy perception explicit:

> A maritime worker who does not actually go to sea, and who therefore does not confront the

> perils of the sea in the course of his work, but who is injured while performing duties on a navigable vessel, must establish that his work involved significant exposure to the dangers attending the movement of vessels on navigable waters in order to recover under the Jones Act.

Robertson I, at 113.

In *Simko*, the plaintiff was "a barge cleaner who frequently worked on his employer's crane barge, firmly moored to the bank of the Ohio River." Robertson I at 112. After suggesting explicit language supporting the court's policy perception, Professor Robertson went on to suggest that it "would have supported a directed verdict for defendant on the status issue, inasmuch as plaintiff's work did not expose him to the perils of the sea or the dangers attending the movement of vessels." *Id.* at 113.

And that brings us squarely to the instant case. Professor Robertson did not suggest that the court in *Simko* deny the plaintiff therein seaman status because he worked on an inland waterway as opposed to the "high seas" or "open seas." Yet, he found sufficient factual evidence, supported by policy considerations, to opine that a directed verdict on the issue of seaman status would have been appropriate in that case. Similarly, in the instant case, the issue is not one of "high seas" versus inland waterways or confined harbors. The issue is one of degrees . . . to what extent has the worker (petitioner) been exposed to the perils of the sea, if any?

The Ninth Circuit and the district court both examined the specific facts of this case, expressly noting the seamen's status policy considerations strongly emphasized by the Court in *Latsis*, before deciding that as a

matter of law, no reasonable jury or trier of fact could find petitioner a seaman. This Court should recognize that the Ninth Circuit's decision is consistent with the policy considerations set forth in *Latsis* and is in no way based upon a finding that petitioner failed to work on the "high seas" or "open seas." The Ninth Circuit did not have to consider whether petitioner worked on the "high seas" or "open seas" because the undisputed evidence showed he was never significantly exposed to the perils of the seas at all. Petitioner was never located a great distance from the shore. Petitioner was never in relative isolation. Petitioner was never denied the accessibility of shore-side facilities. Petitioner was never exposed to wind and weather conditions different from that affecting the land a catwalk distance away. And most importantly, petitioner presented no evidence that he was significantly exposed to the dangers attending the movement of vessels on navigable waters. Bottom line: Petitioner failed to put forth any evidence suggesting the seaman status policy considerations emphasized in *Latsis* supported his claims as a seaman. The only evidence put forth regarding movement of the vessel in this case was that petitioner was not on the barge when it moved across Pearl Harbor in September 1994. Thus, not only do the undisputed facts in this case support the Ninth Circuit's decision, but so do the policy considerations set forth in *Latsis*.

PETITIONER'S "SERIOUS IMPACT" ARGUMENT IS MISPLACED AS THE NINTH CIRCUIT'S DECISION IS CONSISTENT WITH THE DECISION AND ORDER OF ALJ PAUL MAPES, DEPARTMENT OF LABOR, OFFICE OF WORKERS' COMPENSATION PROGRAM (OWCP 15-39103), FOLLOWING AN ADMINISTRATIVE TRIAL ON FEBRUARY 2, 1996

Petitioner's second major argument is that the Ninth Circuit's decision will seriously impact seamen, their employers and the Department of Labor. Petitioner's argument necessarily assumes this Court agrees the Ninth Circuit intended, by its decision in this case, to add a requirement for work on the "high seas" to seaman status. Assuming the Court agrees with respondent that the Ninth Circuit did not so rule, petitioner's argument becomes moot.

However, respondent should also note that contrary to petitioner's suggestion, this is not a case of the Ninth Circuit thrusting unwelcome maritime workers onto the back of the Department of Labor. Recall that petitioner first filed for LHWCA benefits on November 4, 1994. Petitioner's claim went to administrative trial on February 2, 1996 before ALJ Paul Mapes. Inasmuch as the district court's decision had been appealed to the Ninth Circuit at the time of the trial, ALJ Mapes specifically noted that the district court's decision would not have collateral estoppel effect on his decision. As such, ALJ Mapes considered whether the Department of Labor had jurisdiction over petitioner during trial. After receiving testimony, exhibits and briefings from the parties, ALJ Mapes issued his decision and order in OWCP 15-39103 on April 5, 1996, independently finding that petitioner

was a longshoreman under the LHWCA. Petitioner, who was represented by counsel and testified during his administrative trial, did not appeal ALJ Mapes' decision and order on jurisdiction and longshoreman status.

Although respondent believes petitioner's failure to appeal ALJ Mapes' decision and order on jurisdiction and longshoreman status should operate as collateral estoppel to petitioner's continued pursuit of conflicting claims under the Jones Act, respondent is confident this Court will at least recognize the significance of the Department of Labor's decision consistent with the decisions of the district court and Ninth Circuit.

Petitioner has availed himself of the two major mutually exclusive remedial schemes available to maritime workers. He has patiently, and at great expense to respondent, simultaneously proceeded up both remedial ladders and he has received consistent decisions every step of the way. In fact, he reached the top of the LHWCA ladder and received a decision and order finding entitlement to benefits. By failing to appeal the decision and order of ALJ Mapes to the Benefits Review Board, respondent contends petitioner has elected his remedy. Nevertheless, petitioner continues his pursuit up the Jones Act ladder in the hope that he will one day convince some court that he should be entitled to Jones Act remedies. And what happens then? Having reached the top of both mutually exclusive ladders, an irony in and of itself, is petitioner then allowed to pick and choose the remedial scheme under which he would like to accept benefits? There are no easy answers to the complicated predicament petitioner hopes to create by his continued appeal of the Ninth Circuit's decision.

In *Sharp v. Johnson Bros. Corp.*, 973 F.2d 423, 426 (CA5 1992), the court held that the LHWCA was not designed to create a safety net for workers, guaranteeing a minimum award as they seek greater awards in court. *See also Fontenot v. AWI, Inc.*, 923 F.2d 1127, 1132-1133 (CA5 1991). That appears to be the primary purpose behind petitioner's actions in this case. Meanwhile, respondent has been forced to retain counsel and defend its interest under two mutually exclusive remedial schemes. This Court should not further petitioner's cause by granting certiorari.

CONCLUSION

Both the Ninth Circuit and the district court properly focused upon "the essence of what it means to be a seaman." *Latsis, supra* at 369. The petition for writ of certiorari, which raises a hypothetical issue not considered by the courts below, should be denied.

Respectfully submitted,

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